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In The
Supreme Court of the United States
OCTOBER TERM 1965

No. 1263

EASTERN AUTO DISTRIBUTORS, INC.
a corporation,

Petitioner,

v.

J. WESLEY SNYDER, d/b/a Snyder's
Auto Sales,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Eastern Auto Distributors, Inc., prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit decided February 2, 1966.

OPINIONS BELOW

The opinion of the District Court is reported at 239 F. Supp. 740 and is printed in the Appendix at pages 9-21. The opinion of the Court of Appeals, No. 10,051, 4 Cir., Feb. 2, 1966, is printed in the Appendix at pages 22-29.

JURISDICTION

The judgment sought to be reviewed was filed and entered February 2, 1966. The jurisdiction of this Court to review the judgment by writ of certiorari is conferred by 28 USC §1254 (1) (1958).

QUESTION PRESENTED

Is the special venue provision of the Automobile Dealers Franchise Act, §2, 70 Stat. 1125 (1956), 15 USC § 1222 (1958), designed and intended, as held by the court below, "to allow suit where the dealership existed" (Appendix p.p. 26,27)?

Subsidiary questions comprised herein are:

(a) Is the special venue provision of the Automobile Dealers Franchise Act, §2, 70 Stat. 1125 (1956), 15 USC §1222 (1958), supplemented or amplified by the general venue statute, 28 USC §1391 (c) (1958)?

(b) Is the focal time in determining whether venue is proper the time the cause of action arose or the time action was instituted?

(c) Is a foreign automobile manufacturer which has a franchise agreement with an automobile dealer located in a particular judicial district and which periodically sends nonresident sales and service representatives to the dealer's establishment to receive orders, supervise or suggest sales and advertising methods, and to give advice and help in servicing warranties, "found" or deemed to "have an agent" in such judicial district within the meaning of §2, 70 Stat. 1125 (1956), 15 USC §1222 (1958)?

STATUTES INVOLVED

§2, 70 Stat. 1125 (1956), 15 USC §1222 (1958):

> "An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith."

28 USC § 1391 (c) (1958):

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

STATEMENT OF CASE

Respondent, an automobile dealer, instituted action against petitioner, an automobile distributor, under the Automobile Dealers Franchise Act, §§1-5, 70 Stat. 1125 (1956), 15 USC §§1221-25 (1958), in the United States District Court for the Western District of South Carolina. The summons and complaint were served upon petitioner's sales representative, a resident of North Carolina, when he went, by appointment, to

the respondent's place of business to discuss the return of merchandise approximately three months after the effective date of petitioner's termination of respondent's franchise.

Petitioner, a corporation organized under the laws of the State of Virginia and having its principal office and place of business in Norfolk, moved to quash service and dismiss the complaint. The District Court held that the phrase, "in which said manufacturer resides," employed in §2, 70 Stat. 1125 (1956), 15 USC §1222 (1958) is of the same effect as the term "residence" employed and defined in 28 USC §1391 (c) (1958), i.e., wherever the defendant is "doing business" (239 F. Supp. at 244, Appendix p. 14). The District Court held, however, that the focal time for determining venue was when the action was instituted (239 F. Supp. at 245, 246; Appendix p.p. 16,19), at which time petitioner was neither doing business in the Western District of South Carolina nor was the temporary presence of the sales representative in the district sufficient to acquire jurisdiction over petitioner (239 F. Supp. at 246, 247; Appendix p. 20). Petitioner's motion was, therefore, granted.

The Court of Appeals for the Fourth Circuit agreed with the holding of the District Court as to the applicability of 28 USC §1391 (c)[1], but reversed on the ground that the venue facts should be determined as of the time the cause of action arose, at which time the court held that petitioner was not only "doing business" but was "found" and "had an agent" in the district.

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[1]The court said in this connection (Appendix pp. 26-27): "The District Judge quite practically construed the two statutes when he held the term 'resides' of the special venue to be amplified by §1391 (c), declaring 'doing business' to constitute 'residence'. This intrepretation is consonant with the purpose inherent in its associated terms: to allow suit where the dealership existed."

ARGUMENT

The peculiar issue of venue here involved is one of novel impression[2]; and it is reasonable to anticipate that in the absence of a decision by this Court venue in every action that may hereafter be instituted under the Dealers Act by any of the 40,000 franchised automobile dealers[3] will be laid in the District wherein the dealership existed. Petitioner urges that such question should be settled by this Court, particularly as the decision of the court below is premised in part upon a decision in conflict with the decision of another court of appeals, and its decision of subsidiary questions is apparently in conflict with applicable decisions of this Court.

(a) In support of its holding that the special venue provision of the Dealers Act is supplemented or amplified by the general venue statute the Court below cited *Fanning v. United Fruit Co.*, 355 F. 2d 147 (4 Cir. 1966), an action under the Jones Act wherein the definition of residence contained in 28 USC §1391 (c) was applied. As is pointed out in the opinion in that case, however, there is a conflict in the decisions of two other courts of appeals concerning venue in Jones Act cases, *i.e.*: The Court of Appeals for the Third Circuit held in *Leith v. Oil Transport Co.*, 321 F. 2d 591 (1963), that the decision of this Court in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U. S. 222 (1957), a patent infringement action, compelled a narrow reading of the Jones Act venue provisions, unaffected by the liberal venue provisions of 28 USC §1391 (c); whereas the Court of Appeals for the Fifth Circuit

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[2]In some respects related are Fiat Motor Co. v. Alabama Imported Cars, Inc., 292 F. 2d 745 (D. C. Cir. 1961) (Service of process on New Jersey importer by serving president of co-defendant-distributor held sufficient), and Schnable v. Volkswagon of America, Inc., 185 F. Supp. 122 (N.D. Iowa 1960) (Service quashed in action by Iowa Dealer against New Jersey importer and Illinois distributor).

[3]Approximation as of 1956, 3 U. S. Code Cong. & Ad. News (1956) p. 4597.

held in *Pure Oil Co. v. Suarez*, 346 F. 2d 890 (1965), *cert. granted*, 86 Sup. Ct. 549 (1966) (No. 692), that *Fourco* was limited to a construction of the venue provision of the patent infringement statute and that the definition of residence contained in 28 USC § 1391 (c) was applicable.

As indicated, in the present case and in *Fanning v. United Fruit Co., supra*, the court below agreed with the decision of the Court of Appeals for the Fifth Circuit in *Pure Oil Co. v. Suarez, supra*, in which this Court granted certiorari due to the conflicting decision of the Court of Appeals for the Third Circuit in *Leith v. Oil Transport Co., supra*.

(b) In holding that the focal time in determining whether venue is proper is the time the cause of action arose the court below said, "Having conducted its affairs in South Carolina for a period of seven years, Eastern remained answerable there for its contract responsibilities for a reasonable time after cessation of its business in the State."[4] Aside from the fact that this action does not involve petitioner's contract responsibilities but rather its purely statutory obligation "irrespective of contractual provisions,"[5] it appears that the holding may be in conflict with the decision of this court in *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79 (1918), and the reference thereto in *United States v. Scophony Corp. of America*, 333 U. S. 795, 805 (1948), wherein this Court said:

> "Because the Court found that the company had withdrawn from the state in which the district was located and had revoked the authority of its principal agent there, it held that the defendant was not

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[4]Appendix p. 27.

[5]3 U. S. Code Cong. & Ad. News (1956) p. 4596.

'found' in the district, although certain corporate activities continued."

If the decision of this Court in *Peoples Tobacco Co. v. American Tobacco Co., supra,* is not deemed controlling, however, it would appear that due to the frequency of its incidence, not only with reference to venue in actions under the Dealers Act but venue in all actions, this subsidiary question is of such importance that it too should be settled by this Court.

(c) In concluding that petitioner was "found" in the Western District of South Carolina by virtue of its having sent nonresident sales and service representatives into the district during the seven year period prior to termination of the franchise agreement, the decision of the Court below likewise appears to be in conflict with the decision of this Court in *Peoples Tobacco Co. v. American Tobacco Co.,* 247 U. S. 79 (1918), as well as in *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U. S. 359 (1927). In each of these cases it was held that a corporation which had no office or resident agent within a district but sent salesmen into the district for the purpose of taking orders, which the corporation filled by shipping materials into the district, was not "found" within the district, although, as in *Eastman,* it thus "transacted business" there.

CONCLUSION

The decision of the Court below embraces one subsidiary question as to which there is a divergence of opinion in the Circuit Courts, and other subsidiary questions which are either decided in a way in conflict with applicable decisions of this Court or which should be settled by this Court in order to promote orderly and uniform administration of justice.

It is, therefore, respectfully submitted that certiorari should be granted herein.

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OPINION OF THE DISTRICT COURT

Defendant filed dual motions under Rule 7, Rules of Civil Procedure, United States Courts:

I

"The Defendant moves to quash service upon the following grounds: That the person upon whom the purported service of Summons and Complaint was served was not an Officer, a Director of the corporation, nor was he a person upon whom service was proper and authorized within the meaning of the Statutes relating to the Service of the Summons and Complaint."

II

"The Defendant moves to dismiss the Complaint of the Plaintiff upon the following grounds: That the Defendant is not doing business within the Western District of South Carolina and has no agent for the purpose of Service and Process in said Western District, nor does it have offices or agent within said district. That the Title 15, Section 12.22 is not applicable in that it does not enlarge or in any way alter the statutes relating to the method of obtaining service."[1]

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[1] 15 U. S. C. 1222: "Authorization of suits against manufacturers; amount of recovery; defenses.

"An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States *in the district in which said manufacturer resides, or is found, or has an agent,* without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act

Undisputed facts reveal that defendant is a Virginia business corporation, plaintiff a South Carolinian. Before termination[2] of plaintiff's relationship plaintiff was Greenville, S. C., dealer for Renault and Peugeot automobiles, parts, etc. for which defendant had distributorship in South Carolina and other eastern states. Eastern had no place of business, agent, office, or property in South Carolina, but employed one James F. Sharkey, Jr., an admitted resident of Charlotte, North Carolina, as District Sales Manager, he having in his territory the Western part of South Carolina which included Greenville; he not only obtained orders but was general liaison agent and coordinator between the dealers and Eastern.

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in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer; *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. Aug. 8, 1956, c. 1038, § 2, 70, Stat. 1125." (Emphasis added.)

[2]On Feb. 21, 1964, H. W. Smith, Vice President of defendant, wrote to Snyder:

"Please take notice that the undersigned elects to terminate and does hereby terminate, effective thirty (30) days from delivery hereof to you, any and all agreements which the undersigned has at any time entered into with you, if and to the extent now in effect.

This action comes as a result of sub-standard performance by your company for many months in the sale of Renault and Peugeot vehicles as against potential.

Please be advised that, until a replacement dealer is appointed, or for a reasonable length of time until further notice, Eastern Auto Distributors, Inc., will continue to offer you the regular dealer discount on parts purchases and will honor warranty claims as in the past for work done on customer's vehicles. At the effective time of this termination, Eastern Auto Distributors, Inc., will repurchase any new and unused vehicles of current model which might be in your inventory at the then current dealer net cost. In addition, Eastern Auto Distributors, Inc., will repurchase official Renault and Peugeot signs in usable condition at 50% of their original cost to you. At the time of repurchase of parts, they will be repurchased at the then current dealer net price less 10% for handling.

After termination,[3] Eastern wrote plaintiff on May 18, 1964:

"On April 20, 1964, I sent you a letter requesting that you have your Renault and Peugeot signs crated and shipped to Norfolk, and advising that upon their receipt we would make a final accounting with Snyder's Auto Sales. As of this date, the signs have not been received.

"We would also appreciate your advising us when our man might visit your dealership for the purpose of inspecting the vehicles which you have for return and repurchase in accordance with my letter to you of March 30, 1964. We stand ready to pick up the vehicles which our man approves for return at anytime.

"Our parts warehouse advises me that they have opened the cases which you have returned and inventoried the parts contained therein. In round figures the acceptable parts amount to approximately $1900, and the obsolete items which cannot be repurchased amount to approximately $100. Please advise this office what disposition is to be made of these non-returnable parts.

"When the vehicles have been returned, and the signs have been shipped to Norfolk, a final accounting can be made with your dealership. We are most anxious to accomplish this end, and would appreciate your cooperation in this regard."

Again on June 2, 1964:

"Please refer to my letter of May 18, 1964, which you received on May 21, 1964, according to certified

[3]Plaintiff's affidavit approving the motion stated:

"After my relationship with Eastern as a Renault and Peugeot dealer had been terminated, we continued to have correspondence."

receipt No. 968642, in which I asked you to advise me when our representative might visit your dealership for the purpose of inspecting the vehicles which you have for return, and in which I asked that you ship the genuine Renault and Peugeot signs to Norfolk so that we might make a final accounting with your dealership. As of this date I have not received an answer.

"I have in my possession a credit memorandum in the amount of $2035.38 made out to Snyder's Auto Sales for the parts which you returned, however, I am holding this memo pending your compliance with my requests in my letter of May 18th referred to above. It is in your best interest to cooperate at this time, since we have repeatedly advised you that we stand ready to make our final settlement immediately upon your compliance with our reasonable requests.

Very truly yours,

EASTERN AUTO DISTRIBUTORS, INC.

HWS:mcs
Acc: Mr. S. F. Blocker
Mr. J. F. Sharkey"

On June 8, 1964 plaintiff replied:

"I will be glad for your representative to call upon us; and if you will please advise me what time to expect him, I shall arrange to be in town to meet him.

Sincerely,

SNYDER'S AUTO SALES"

On June 19, 1964, Sharkey telephoned plaintiff from a point in North Carolina, arranged to meet with Snyder the same afternoon at plaintiff's place of business in Greenville.

Upon arrival he was served with Summons and Complaint in this action by a United States Marshal for the Western District of South Carolina.

Was Sharkey a proper person upon whom to effect service under the terms of the statute relied on? (Note 1, *supra*.)

Not questioned here is the inclusion of Eastern in the term "manufacturer" within the meaning of the statute. Suffice it to say that if same were contested the court would have to make further inquiry into, among other matters, the franchise agreement between Eastern and its foreign manufacturer or supplier.[4] No issue thereabout is before the Court. We are fortunate to have, on this subject, the able definitions included by Congress under provision of 15 U. S. C. 1221.[5]

The Court's pursuit must next engage on the question of whether the Western District of South Carolina is a judicial district "in which said manufacturer resides", within the meaning of the Statute (Section 1222). Since the passage of the

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[4]See *Barney Motor Sales, etc., v. Cal. Sales, Inc., etc.*, 178 F. Supp. 172.

[5]Which reads in part: (a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles. (b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract. (c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

legislation in 1956 no issue of such definition has been passed upon. The legislative history[6] recites:

> Section 1 (c) has been amended to define an automobile dealer as any concern "resident in the United States or in any Territory thereof or in the District of Columbia," operating under the terms of a written franchise and engaged in the sale of passenger cars, trucks, or station wagons. This amendment limits the right to bring suit in the district courts of the United States to dealers resident in the United States or its Territories. The record before the committee was concerned only with coercive practices by manufacturers with respect to their United States dealers. The Committee has no information with respect to such practices involving dealers situated in foreign countries.

This is the only reference to what is now 15 U. S. C. 1222.

This Court finds, in the absence of definition or limitation in the statute referred to that, insofar as the corporate defendant here is concerned the provisions of Title 28 U. S. C. § 1391 (c)[7] define where defendant resides. If defendant was "doing business" within the Western District of South Carolina at the time of commencement of the action,[8] the motions would not prevail on the grounds of lack of residence.

The statute before the Court is similar to that found ap-

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[6]1956 U. S. Code and Adm. News, p. 4596, 4601.

[7]Which reads: "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

[8]See *Beck v. Bailey*, 31 F. R. D. 201 (D. C. S. C. 1962).

plicable to patents and copyrights.[9] In comparing that statute with 1391 (c) the Seventh Circuit Court of Appeals held in *Dalton v. Shakespeare Co.*, 196 F. (2d) 469, 479:

> "If Congress intended the definition of Section 1391 (c) to be limited to certain types of actions, Congress would have plainly said so. If, on the contrary, Congress had intended to provide that corporations are, for venue purposes, residents of those districts in which they are doing business, regardless of the particular wrong with which the corporation may be charged, it, by using the word "residence" in Section 1391(c) and "resides" in Section 1400(b), certainly took the right course to do so."

As is shown by the affidavits of H. W. Smith and James F. Sharkey, Jr., Mr. Sharkey is a citizen and resident of Charlotte, North Carolina and is neither an officer, director, or stock holder of the defendant corporation but is a salaried employee with the title of District Sales Manager, having primary duties of calling on the defendant's various dealers and obtaining orders for automobiles and rendering such advice to dealers as they may request. From March 21, 1964, until the present, however, the defendant has had no dealers in the Western District of South Carolina.

Assuming, arguendo, that James F. Sharkey, Jr., was an agent of the defendant as contemplated by Ttitle 10, Sections

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[9]Title 28 U. S. C. 1400 which reads: *Patents and copyrights.*

(a) Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights may be instituted in the district in which the defendant or his agent resides or may be found.

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

421 and 423 of the South Carolina Code of Laws for 1962[10] the requirements of Rule 4(d) (7), Federal Rules of Civil Procedure, would have been satisfied; but as is stated in *Arrowsmith v. United Press International*, 320 F. (2d) 219, 224, this rule relates only to the manner of service and leaves open the question of whether the corporation is amenable to suit. As to this question the following principles are adopted here:

(a) Service upon an officer of the defendant corporation who is temporarily within a state is insufficent, *Lemiere v. Mae Edna Wilder, Inc.*, 261 U. S. 174; *Long v. Victor Products Corp.*, 297 F. (2d) 577, *Brays Island Plantation v. Harper*, ... S. C. . . . ., ... S.E. (2d) . . . . (1965) (decided March 4, 1965);

(b) The question of whether a corporation is "doing business" or "is found" within a state must be determined as of the time the action was filed, *Cf. Prolex Steel Corp. v. Luria Bros. & Co.*, 225 F. Supp. 412.

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[10]Which provide: Section 10-421. *How summons served on corporations generally.*—If the suit be against a corporation, the summons shall, except as otherwise expressly provide, be served by delivering a copy thereof to the president or other head of the corporation, or to the secretary, cashier or treasurer or any director or agent thereof; *provided, further,* that, in the case of domestic corporations, service as effected under the terms of this section shall be effective and confer jurisdiction over any domestic corporation in any county where such domestic corporation shall own property and transact business, regardless of whether or not such domestic corporation maintains an office or has agents in that county.

Section 10-423. *Same; qualification as to foreign corporations.*—Service can be made in respect to a foreign corporation under the provisions of § 10-421 only (a) when it has property within the State, (b) when the cause of action arose therein or (c) when such service shall be made in this State personally upon the president, cashier, treasurer, attorney, secretary or any other agent thereof.

As previously noted, James F. Sharkey is a resident of North Carolina and the defendant corporation had no dealers in the Western District of South Carolina on June 19, 1964, when Sharkey, whose duty was to call on dealerships, was served, nor has it had any dealers in the district from March 21, 1964, until and including date of service. The sole purpose of Sharkey's trip to Greenville, South Carolina was to meet with the plaintiff and inspect vehicles which the plaintiff ostensibly had for return to the defendant; but, as stated, upon his arrival he was served with the summons and complaint and he was then advised that the plaintiff did not wish to return any vehicles.

Lemiere v. Mae Edna Wilder, Inc., supra, involved an action under the copyright Act which provided that suits "may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found." Lemiere was a citizen and resident of New York City in the southern district. The defendant corporation had its place of business in the western district and had no place of business in the southern district nor had it any agent or employee in the southern district authorized to carry on business in his behalf. Lemiere instituted action in the federal court for the southern district and service of process was made by delivery to Mr. Adkin, President of the defendant corporation, a copy of the summons while he was temporarily in New York City. In holding that service was invalid in opinion written by Mr. Justice Brandeis, the Court said:

> "That jurisdiction over a corporation cannot be acquired in a district in which it has no place of business and is not found, merely by serving process on an executive officer temporarily therein, even if he is there on business of the company, has been settled."

Similarly, in the recent case of *Long v. Victor Products Corp.* (8th Cir.), 297 F. (2d) 577, the complaint was dis-

missed on the ground of lack of jurisdiction over the defendant in the eastern district of Missouri. In that case the plaintiffs were citizens of Missouri and the defendant was a Maryland corporation not formerly authorized to do business in Missouri. Service of the summons and complaint was effected by the United States Marshal on the Chairman of the Board and the Vice-President of the defendant corporation while they were in St. Louis, Missouri attending a convention at which the defendant corporation maintained a booth; and at the time the defendant had a salesman, whose title was District Sales Manager, who resided in Missouri and solicited orders therein. After noting the applicability of the principles prescribed by the Supreme Court in *International Shoe Co. v. State of Washington*, 326 U. S. 310, the court went on to say:

> "It is, of course, long settled that jurisdiction over a foreign corporation is not acquired merely by the service of process upon an executive officer temporarily present in the state or district even though he is there on corporation business. *James-Dickinson Co. v. Harry*, 273 U. S. 119; *Bank of America v. Whitney Bank*, 261 U. S. 171; *Collar v. Peninsular Gas Co.*, 295 S.W. (2d) 88.

It may be argued that during the period in which the plaintiff was the defendant's dealer Snyder was, himself, the defendant's agent within the contemplation of Title 10, Sections 421 and 423 of the South Carolina Code of Laws for 1962, as amended. See *Szantay, Adm'x. v. Beech Aircraft Corp.*, ... F. Supp. . . . . (E.D. S. C. 1965) (decided January 19, 1965), and the cases cited therein, although such would, of course, not necessarily be the result as each case must stand on its own facts. *Long v. Victor Products Corp., supra.* Similarly, it might be argued that during the period in which the plaintiff was the defendant's dealer Sharkey, in soliciting

orders from the plaintiff and rendering other services, was the defendant's agent for the purpose of service of process. But the plaintiff's dealership was terminated on March 21, 1964, some three months before this action was instituted, and at a time when the defendant had no dealers in the Western District of South Carolina with whom Sharkey could transact business. As stated by the court in *Proler Steel Corp. v. Luria Bros. & Co.*, 225 F. Supp. 412, 413, "It is well settled that venue and jurisdiction are determined by the facts as they exist at the time the action is filed." Although the defendant may have resided, or might have been found, or had an agent in the Western District of South Carolina prior to March 21, 1964, such was not the situation on June 19, 1964, and if Congress, in enacting the Automobile Dealers Statute, had intended that action could be laid in the district wherein the dealership was situated it would have so stated rather than providing for suit "in the district in which said manufacturer resides, or is found, or has an agent." If action under the statute could be maintained in the district wherein the manufacturer or distributor had terminated a dealership agreement the plaintiff would have encountered no difficulty in *Schnable v. Volkswagen of America, Inc.* (D. C. Iowa), 185 F. Supp. 122 (service quashed in action by Iowa dealer against New Jersey importer and Illinois distributor). And it is reasonable to assume that if the statute were so intended the plaintiff in *Fiat Motor Co. v. Alabama Imported Cars, Inc.*, 292 F. (2d) 745, would have instituted action in Alabama rather than the District of Columbia.

See also *Blount v. Peerless Chemicals (P. R.), Inc.*, Second Circuit 1963, 316 F. (2d) 695, *cert. denied*, 375 U. S. 831; *Long v. Victor Products Corp.* (8th Cir. 1962), 297 F. (2d) 577; *Powell v. Seal Ectro Inc.*, 205 F. Supp. 6. These cases hold the "presence" of defendant necessary to a finding of "doing business"; a presence not shown here.

It may be argued, admitting that neither residence nor agency can be the foundation for jurisdiction and suit here, was not Sharkey, as agent, "found" in Greenville by the process service? If so, the corporation is also "found" there. The authorities do not so hold.

Sharkey was temporarily in South Carolina, but on the business of the corporation. His visit was not part of a systematic and continuous activity[11] of such nature. He was not maintained by defendant as an agent in the district;[12] his temporary presence was insufficient for valid service of process. There is an insufficiency of facts to hold defendant "found" in the Western District of South Carolina. There is no waiver here.

The isolated incident of the visit of Sharkey to Greenville is insufficient to sustain plaintiff's effort to obtain jurisdiction by the service effected. Venue as to suits relative to copyrights is authorized by similar language. (Note 9, *supra*). In *Cargill v. Mark's Credit Clothing* (D. C. N. Y.), 29 F. Supp. 725, 728, we find applicable reasoning. A single visit was ruled insufficient.

> "When a foreign corporation, engaged in business as a retailer in another district, places orders for the purchase of merchandise from wholesalers within this district, through a buyer who comes here at regular intervals for that purpose, or through so-called resident buyers, such as the Associated Budget Retailers of America, Inc., the foreign corporation is not, in my opinion, doing business within this district so as to be considered as "found" here, within the meaning of Section 35."

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[11]See *Gauvreau v. Warner Bros. Pictures, Inc.*, 178 F. Supp. 510.
[12]*Backer v. Conder Ceramic Arts*, 90 F. Supp. 737.

To the same import is *Gauvreau v. Warner Bros. Pictures, Inc., supra. U. S. v. Watchmakers of Switzerland Information Center,* 133 F. Supp. 40, 42.

Plaintiff has made no showing sufficient to warrant the protective covering of the statute under which he proceeds.

The motions should be granted.

In accordance with 28 U. S. C., § 1292(b), the Court hereby certifies that it is of the opinion that the within order involves controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from the within interlocutory order of the Court may materially advance the ultimate termination of the litigation; and that either party should have the opportunity to apply to the Court of Appeals for the Fourth Circuit for permission for an appeal to be taken from such order if either should so desire. Should such application for an appeal be made by either party and such permission be granted by the Court of Appeals, then further proceedings in this case shall be stayed until a determination of the appeal.

AND IT IS SO ORDERED.

ROBERT W. HEMPHILL,
United States District Judge.

Rock Hill, South Carolina,
March 10, 1965.

OPINION OF THE COURT OF APPEALS

Before Bryan and Bell, Circuit Judges, and
Maxwell, District Judge

Albert V. Bryan, Circuit Judge:

The question here is the amenability of the defendant Eastern Auto Distributors, Inc. to service of the process of the United States District Court for the western district of South Carolina in an action brought by J. Wesley Snyder, trading as Snyder's Auto Sales. The suit, resting on The Automobile Dealers Franchise Act, 15 USC 1221-1225, was to recover damages for Eastern's allegedly unwarranted cancellation of its automobile dealership agreement with Snyder.

The District Court dismissed, on motion, for want of jurisdiction, finding that Eastern had wthdrawn from the State before service. In the course of its opinion the Court, overruling Eastern's preliminary contention, held that the general venue statute, 28 USC 1391(c), supplemented the special venue provision of the Franchise Act. In that holding we join. However, we cannot accede to the holding that Eastern's withdrawal after cancellation and before suit, even if true, immunized it from Snyder's suit. Hence we reverse, believing the service good.

The Franchise Act declares in section 1222:

> "An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer *resides, or is found, or has an agent,* without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after Aug-

> ust 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer. . . ." (Accent added.)

The general venue provision, 28 USC 1391(c), is as follows:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

The undisputed circumstances here were these. Eastern, a Virginia corporation, held the distributorship in South Carolina and nearby States for Renault and Peugeot automobiles. parts and accessories. In 1957 it granted Snyder a dealer franchise for the sale of Renaults, and in 1958 for Peugeots. His place of business was in Greenville, South Carolina and his dealership territory embraced the northwestern part of the State. Admittedly, Eastern was an "automobile manufacturer", Snyder an "automobile dealer", and their agreement a "franchise", and both were engaged in "commerce", within the definitions of the Act, 15 USC 1221.

The agreement required Eastern to make available to Snyder periodically a certain number of cars for sale. It stipulated that Eastern would furnish him with advertising signs and displays and promotional materials from time to time. Title to each of the automobiles delivered to Snyder remained in Eastern until payment for it was made in accordance with the current price schedules of Eastern. Snyder was obliged to establish and maintain a show room, a repair shop and a place of business satisfactory to Eastern "in appearance, size, layout and equipment," with no change in location permit-

ted without the prior approval of Eastern. Further, the dealer was required to maintain working capital, and a system of accounting for Eastern's business similar to the system used by its other dealers. Inspection of Snyder's books and records was to be allowed during business hours.

Eastern had assumed responsibility to the car producers for fulfillment of their warranties on each car. Snyder covenanted to undertake this obligation, to make the necessary adjustments with the owners and to replace parts as needed. Eastern was then to reimburse Snyder for any expense incurred in this aspect of the dealership.

Monthly, throughout the duration of the agreement, Eastern sent to Snyder's establishment in Greenville a district sales manager to receive car orders. The district manager would complete and sign them for Eastern at Snyder's plant and, when executed by Snyder, forward all the papers to Eastern's office in Virginia, James F. Sharkey, Jr. acted in this capacity for Eastern during the last 18 months of the agreement. At the same time he supervised Snyder's sales methods and offered suggestions of improved sales techniques and advertising methods. Additionally, a service representative of Eastern regularly called to see if Snyder was meeting his responsibilities in regard to the car warranties, and also gave expert help and advice to Snyder for servicing the Renaults and Peugeots.

On February 21, 1964 Eastern wrote Snyder that it would terminate the franchise agreement effective 30 days from receipt of the letter. The ground given for the cancellation was the "substandard performance by your company for many months in the sale of Renault and Peugeot vehicles as against potential". The notice further advised that "until a replacement dealer is appointed, or for a reasonable length of time until further notice", Eastern would continue to offer Snyder the regular dealer discounts on parts and would honor war-

ranty claims "as in the past for work done on customers' vehicles". Eastern then also represented that it would repurchase at current dealer cost any new cars and parts in Snyder's inventory. Likewise, it promised to repurchase at fifty percent of cost his permanent Renault and Peugeot advertising signs found in acceptable condition.

After the termination, correspondence continued between Eastern and Snyder with regard to the dissolution. On May 18, 1964 Eastern wrote Snyder reminding him of Eastern's unanswered request that all Renault and Peugeot signs in his possession be shipped to Norfolk, Virginia, repeating that upon their receipt Eastern would make a final accounting with him. Simultaneously, Eastern asked Snyder to advise when its representative might come to Snyder's shop to inspect the vehicles and other materials which were to be returned. Assurance was renewed that on the return of the cars, parts and signs "a final accounting can be made with your dealership". A copy of this letter went to Sharkey.

In another letter to Snyder, dated June 2, 1964, Eastern noted that no reply had been received to its letter of May 18, and said again that it was ready to make final settlement. On June 8, 1964 Snyder replied that he would be glad to receive Eastern's representative at such time as it designated. Sharkey telephoned Snyder on June 19, 1964 from North Carolina and arranged to meet him that afternoon at Snyder's place in Greenville. When he arrived he was served with the summons and complaint in the present action, Greenville being situated in the western district of South Carolina.

Venue here, appellee Eastern insists, is dictated solely by The Automobile Dealers Franchise Act, 15 USC 1222, supra, without reference to the general provision, 28 USC 1391(c). The argument is that as the Act's designations are specific and special, they are therefore exclusive, citing Fourco Glass Co. v. Transmirra Glass Prods. Corp., 353 US 222 (1957). On this

postulate, Eastern argues that venue was improperly laid because the facts did not establish that Eastern, as the Act demands, "resided" or was "found" or had an "agent" in the western district of South Carolina at the time of service. Obviously the issue of venue now made embraces concomitantly the question of jurisdiction.

As did the District Court, we believe the exclusivity argument untenable and the general venue statute apposite. Eastern's reliance on *Fourco* is altogether refuted by the reasoning of Judge Sobeloff's opinion for this court in Fanning v. United Fruit, No. 10,004, 4 Cir., January 4, 1966. There *Fourco* is soundly distinguished as applying a statute (unlike the Franchise Act relating to an ordinary contract action) covering a special subject—patent infringement—which by its own nature warrants a peculiar venue.

Eastern's contacts with the western district of South Carolina fully established the District Court's jurisdiction. International Shoe Co. v. State of Washington, 326 US 310 (1945); Shealy v. Challenger Mfg. Co., 304 F. 2d 102 (4 Cir. 1962). At the same time they clearly met the venue specifications of both the Franchise Act and the general statute.

The circumstances already recounted reveal Eastern, during the agreement's entire seven years, as continuously "found" in the district of suit within the meaning of the Franchise Act, in that it was there diligently carrying on business. United States v. Scophony Corp. of America, 333 US 795, 808 (1948); Aro Mfg. Co. v. Automobile Body Research Corp., 352 F 2d 400, 404 (1 Cir. 1965). Likewise the "doing business" stipulation of § 1391(c) was also satisfied. The District Judge quite practically construed the two statutes when he held the term "resides" of the special venue to be amplified by § 1391(c), declaring "doing business" to constitute "residence". This interpretation is consonant with the purpose inherent in its associated terms: to allow suit where the dealer-

ship existed. Cf. Fanning v. United Fruit, supra, No. 10,004, 4 Cir., January 4, 1966. The third alternative of the special venue —"an agent" in the district—was also fulfilled by the repeated presence of district manager Sharkey. Thus the demand of both statutes are amply answered.

The soundness of these conclusions is pointed up by a summation of the implications and consequences of the agreement. It invested Eastern with substantial control of Snyder's business in numerous aspects. A comprehensive surveillance of Snyder's operations, both interstate and locally, was effectuated. This was a domination which, it will be recalled, went to the extent of imposing upon Snyder, in full, the vicarious obligation of Eastern to make good the car producers' warranties. Thus Snyder was in many respects the alter ego of Eastern.

Turning now to the crux of this case—whether Eastern's withdrawal from South Carolina bars the suit—we cannot join in the District Judge's understanding that Eastern must have been found or doing business in South Carolina *on the day of service.* The focal time in determining whether Eastern is subject to the Court's jurisdiction and whether venue is proper is *when the cause of action arose.* See, e.g., Electrical Equip. Co. v. Daniel Hamm Drayage Co., 217 F 2d 656 (8 Cir. 1954). If jurisdiction and venue were proper at the time of cancellation, as we have determined, Eastern could not thwart subsequent suit by immediate withdrawal from the State. Having conducted its affairs in South Carolina for a period of seven years, Eastern remained answerable there for its contract responsibilities for a reasonable time after cessation of its business in the State. See Electrical Equip. Co. v. Daniel Hamm Drayage Co., supra. 217 F 2d 656 (8 Cir. 1954); Westcott-Alexander, Inc. v. Dailey, 264 F 2d 853, 860-61 (4 Cir. 1959). Snyder's suit insituted within three months of the cancellation is clearly timely.

Eastern also contends that service was properly quashed since Sharkey was neither an officer nor director of the corporation, nor a person upon whom service was otherwise authorized. The service was defective, it is said, because when served he was in South Carolina only temporarily and not on any of Eastern's business arising out of the cause of action. Lumiere v. Mae Edna Wilder, Inc., 261 US 174, 177 (1923); Long v. Victor Prods. Corp., 297 F 2d 577 (8 Cir. 1961). The contention is unimpressive.

When the complaint and summons were handed Sharkey he was about his employer's enterprise in Greenville, indeed the matter now in controversy. He was not there on a private visit or casual sojourn. He was still the emissary of Eastern and his mission a continuation of regular duties. Under the law of South Carolina, service of Sharkey was allowable, and so it sufficed for Federal court jurisdiction. Code of S. C. 1962, §§ 10-421,-423; F.R. Civ. P. 4(d)(7).

The Supreme Court of South Carolina many years ago vouched the validity of service in circumstances akin to those here, in Jones v. General Motors Corp., 197 S. C. 129, 14 SE 2d 628, 632 (1941), Justice Fishburne saying:

> "We have held that where a foreign corporation sends an agent into the state for the transaction of its corporate business—a business or transaction out of which the cause of action arises—it may be regarded as doing business in the state to the extent that service of process upon such agent will give the courts of this state jurisdiction. This rule is based upon an implication arising from the facts of the case that the corporation does business or has business in the state for the transaction of which it sends an agent here. It prevails where the officer or agent is in the state with reference to the settlement or adjustment of the claim

sued upon, since in such case the mere presence of the officer or agent for such a purpose may be held to constitute the doing of business in the state."

Because his residence was in another State, of course upon every occasion he visited South Carolina on business, Sharkey was there only "temporarily". But that, obviously, is not the kind of temporariness which would prevent service of Eastern through service of him.

Reasonable assurance that Eastern would receive actual notice of the suit was established and that is enough. See International Shoe Co. v. State of Washington, supra, 326 US 310 (1945); Jones v. General Motors Corp., supra, 197 S. C. 129, 14 SE 2d 628 (1941).

As we find jurisdiction, venue and service unimpeachable, the decision of the District Court is reversed and the case remanded for trial.

Reversed and remanded.

JUDGMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 10,051

J. Wesley Snyder, d/b/a Snyder's Auto Sales,

Appellant,

vs.

Eastern Auto Distributors, Inc., a Corporation,

Appellee.

Appeal from the United States District Court for the Western *District of* South Carolina.

This cause came on to be heard on the record from the United States District for the Western *District of South Carolina, and was argued by counsel.*

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of South Carolina, at Greenville, for further proceedings not inconsistent with the opinion of the Court filed herein. February 1, 1966.

Albert V. Bryan
United States Circuit Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1263

EASTERN AUTO DISTRIBUTORS, INC.,
A CORPORATION, PETITIONER,

versus

J. WESLEY SNYDER, d/b/a SNYDER'S AUTO SALES,
RESPONDENT

BRIEF OF THE RESPONDENT, J. WESLEY SNYDER, d/b/a SNYDER'S AUTO SALES, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Was the special venue provision of the Automobile Dealer Franchise Act, § 2, 70 Stat. 1125 (1956), 15 U. S. C. § 1222 (1958), correctly construed by the Court below to allow suit in the instant case in the district where the dealership existed?

Although the peculiar issue of venue here involved is one of novel impression under the Automobile Dealers Franchise Act, it is not reasonable to expect that absent a decision by this Court there will be a flood of cases brought in District Courts in districts in which they could not otherwise have been brought. In the case, at least, of the four major American automobile manufacturers it is reasonable to anticipate that other dealers will be maintained in the same district and division as that of a wrongfully cancelled

dealership franchise and that the manufacturer's relations with his remaining franchise outlets will amount to sufficient activity in the forum to meet both jurisdictional and venue requirements. A problem, if there is any problem, would be created only with respect to certain foreign manufacturers and some American truck manufacturers.

There is no public policy which would require a different construction than that placed upon the Act by the Circuit Court. That construction does nothing more than give the plaintiff a right to bring his suit and have it tried in the district where the defendant had committed its violation of the Act and where it had inflicted the injuries forbidden by the Act.

The petitioner in his argument divides the question into three subsidiary questions which are discussed in the same order herein.

(a) While the Circuit Court held that the general venue statute, 28 U. S. C. § 1391(c) should be construed in consonance with and as supplementary to the venue provision of the Automobiles Franchise Act, the Court did not rely exclusively upon the general venue statute as justifying its decision. Rather the Circuit Court in its opinion stated that the demands of the venue statute were amply fulfilled. The Court said: "At the same time they [the Petitioner, Eastern Auto Distributors, Inc.] clearly met the venue specifications of both the Franchise Act and the general statute." (Petitioner's Appendix, page 26.) Since the Circuit Court decided that the venue provisions of the Automobile Dealers Franchise Act standing alone were satisfied, it is unnecessary for the further question of whether it needs to be bolstered in this case by the general venue statute to be considered.

The apparent conflict in decisions of other courts of appeals cited by Petitioner is not a conflict whose resolu-

tion would clarify the particular issue in the instant petition. As the petitioner's argument points out, that apparent conflict would involve an interpretation of the Jones Act, a law entirely unrelated to the Anti-Trust Statutes of which the Automobile Dealers Franchise Act is a part.

(b) The Circuit Court correctly held that the focal time in determining whether venue is proper is the time when the cause of action arose. Any other interpretation of this or any other venue provision would completely change the practical result in every lawsuit. A defendant could in every case choose the forum in which litigation would have to be brought against him by withdrawing immediately upon the commission of any wrong. A "hit and run corporation" could effectively insulate itself from suit in the forum where the wrong occurred by keeping on the move. Not only would all plaintiffs be inconvenienced in having to pursue a withdrawing corporation to its home office, but probably only the very rich would find themselves able to underwrite the cost of a lawsuit in a distant forum. If the law in this respect must be declared, justice requires that it be declared in the same terms as used by the Circuit Court in its opinion.

(c) The Circuit Court did not err in its interpretation of the word "found" in the venue provisions of the Automobile Dealers Franchise Act. It is not by coincidence that this Act uses the identical language of the personal jurisdiction provision of the Sherman-Clayton Act, 15 U. S. C., § 15. The word "found" is correctly given the same meaning as used in that provision as well as the same applied to it under the corporate venue section of the same Act, 15 U. S. C., § 22. *Peoples Tobacco Company v. American Tobacco Company*, 247 U. S. 79 (1918) is not applicable as it construed the Sherman Act prior to the 1914 amendments

of the Clayton Act. The effect of the 1914 amendments as well as the plain intention of Congress in broadening the venue provisions is clearly stated in *United States v. Scophony Corporation*, 333 U. S. 795 (1948):

> Thus, by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the "found"-"present"-"carrying-on-business" sequence, the Court [in *Eastman Kodak Company v. Southern Photo Materials Co.*, 273 U. S. 359 (1927)] yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the anti-trust laws from the "often insuperable obstacle" of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due.

CONCLUSION

The decision of the Court below correctly construed the statutory provisions in question consistent with prior decisions of this Court and with the intention of Congress and as to neither of them is there a conflict from any source. It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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